

October 20, 2014

Steve Wilkinson
Director of Schools
Henderson County Schools
35 East Wilson Street
Lexington, Tennessee 38351

Re: Complaint # 04-14-1529

Dear Mr. Wilkinson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint filed by the Complainant on behalf of her son (Student) against Henderson County Schools (District) on April 23, 2014, alleging discrimination on the basis of disability (deaf) and retaliation, as follows:

1) The District failed to timely and properly evaluate the Student by holding meetings but not making a placement decision, not agreeing to provide an interpreter for the Student and not considering the Student's former school, West Tennessee School for the Deaf's (WTSD) team recommendation that the Student did not qualify for the Comprehensive Development Class (CDC), a self-contained special education program. The Complainant asserted that the Student had recently been tested by another school for the deaf and found ineligible for the CDC program, but the District ignored this determination.

2) After advocating for revisions to the Student's Individual Education Program (IEP) to enroll him in his home school, Pin Oak Elementary (School), the District retaliated during March-May 2014 in the following manner:

- a) Stating the Student would fail if he attended the School, and threatening to place him in the CDC Program or in a school for the deaf five hours away.
- b) Denying the Student an interpreter due to budget constraints and making poor efforts to hire an interpreter.
- c) Wrongfully accusing the Complainant of harassing a special education teacher and a potential interpreter applicant.
- d) Denying the Complainant communication with her children's teachers.
- e) Coercing the Complainant to sign a document acknowledging the offer of the school for the deaf as an option.
- f) Diagnostician referring to the Complainant as 'this b*tch' and the Special Education Director stating "I'm going to kill her."

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance; and Title II

of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department, the District is subject to the provisions of Section 504. As a public entity, the District is also subject to the provisions of Title II. Accordingly, OCR has jurisdiction over this complaint.

OCR therefore, initiated an investigation of the following issues:

1. Whether the District failed to properly and timely evaluate, and place the Student, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.35 and the Title II implementing regulation at 28 C.F.R. §35.130.
2. Whether the District retaliated against the Complainant and her children after the Complainant advocated to enroll the Student in his Home School, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. §35.134.

Regulatory Standards

Evaluation/Placement

The Section 504 implementing regulation at 34 C.F.R. § 104.35(a) requires that a recipient evaluate any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in a regular or special education program. The Section 504 implementing regulation at 34 C.F.R. § 104.35(b) requires a recipient to establish standards and procedures for the evaluation and placement of students who need or are believed to need special education or related services. The applicable Title II implementing regulations at 28 C.F.R. § 35.130 (a) and (b) are interpreted consistent with the Section 504 regulations cited above.

As set forth in Appendix A, Subpart D of the Section 504 regulation, it is not the intention of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the “process” requirements of the Section 504 regulation concerning the identification, location, evaluation, and due process procedures. The appropriate forum for challenging educational decisions is through the impartial due process hearing procedures in the District.

Retaliation

In order to establish that unlawful retaliation has occurred, OCR must determine whether: (1) the individual engaged in a protected activity; (2) the recipient was aware of the protected activity; (3) the recipient took adverse action against the individual contemporaneous with or subsequent to the protected activity; (4) there was a causal connection between the adverse action and the protected activity; and (5) the recipient cannot show legitimate, nondiscriminatory reasons for its actions. If at any point in the analysis, OCR finds insufficient evidence to

establish any of the aforementioned elements, OCR concludes that there is insufficient evidence to establish noncompliance without further analysis.

Facts and Analysis

Issue 1: Failure to properly and timely evaluate

At the time of filing this OCR complaint, the Complainant alleged that the District held IEP meetings, but would not make a placement decision, would not agree to provide an interpreter for the Student and would not consider the Student's former school's recommendation that the Student did not qualify for the CDC program. The Complainant asserted that the Student had recently been tested by another school for the deaf and found ineligible for the CDC program, but the District ignored this determination.

The Complainant alleged that in early 2014, while the Student was still enrolled at his former school, WTSD, she contacted the District regarding placement of the Student at the School for the 2014-2015 school year, including an evaluation of the Student for services. The District's calendar lists the first day of classes as August 5, 2014. The evidence shows that from spring 2014 to August 2014, the District and Complainant communicated and met regarding the Student's placement.

A February 2014 WTSD evaluation included an audiology evaluation and noted that while attending WTSD, the Student received total communication (spoken/sign language at same time), use of FM system daily, tests read aloud, lots of visuals, extended time, verbal/signed explanation of directions and speech/language therapy. For transition at the School next year, WTSD recommended the following: full time and consistent use of an FM system; intense support learning auditory, speech, language, reading and writing skills; note-taking, captioned films and pre-teaching of new information required; and use of sign language will be useful to access linguistically complex instruction. Interpreter services and captioning/transcribing was not utilized at WTSD.

In April 2014, the Student was given the Woodcock-Johnson III Normative Updates Test and this was included in the District IEPs. In May 2014, an assistive technology (AT) evaluation was completed by the District in observation of the Student while he was still attending WTSD. The AT evaluation recommended a typing device with a software word prediction program called CoWriter and a keyboarding software program called Type to Learn. In late May 2014, the District hired an interpreter who had experience as both an educator and an interpreter at two other school systems.

The District produced the Student's IEPs in effect for the 2014-2015 school year (three IEPs dated 8/4, 8/13 and 8/27/14). The IEPs state that the Student's hearing loss makes it difficult for him to comprehend and complete grade level work in the regular education classroom without modifications, and lists numerous classroom and testing accommodations for him, such as providing abbreviated assignments, directions in alternative format, extra cues/prompts on assignments, preferential seating, use of an augmentative and alternative communication (AAC) device, speech/language therapy and an interpreter 7 hours/day, 35 hours/week. OCR compared

the aids/services listed in the February 2014 IEP from WTSD to the August 4, 2014 IEP from the District. The District IEP lists the same classroom accommodations as the IEP from WTSD, as well as additional services that are not in the WTSD IEP, i.e. peer tutoring, use of a calculator and use of an interpreter and auditory trainer. Additionally, the August 27, 2014 IEP shows additional testing/resources were considered such as STAR Diagnostic test dated August 11, 2014, and a Student Transition Questionnaire dated August 27, 2014.

The IEPs further provide that the Student will participate in all regular education classes with his peers with use of an auditory trainer and interpreter, and is eligible to participate in all age-appropriate extracurricular activities. The IEPs state that the Student has tubes in his ears and also uses hearing aids. The IEPs have the Complainant's signature, and the Complainant confirmed to OCR that she was provided with her procedural safeguards at every meeting. Contrary to the Complainant's allegation, OCR found that the District relied on the WTSD evaluations and the Student was provided an interpreter¹ and was not placed in a CDC program.

Based on the foregoing, the evidence indicates that the District responded to the Complainant's request for an evaluation by considering the evaluations conducted by WTSD, providing the Student an IEP with interpreter services, to which the Complainant signed and the Student has attended the School for the 2014-2015 school year. Based on the documentary evidence provided by the Complainant and the District, OCR finds that Issue #1 has been resolved. Therefore, OCR will take no further action with respect to this issue.

Issue 2: Retaliation

During the course of OCR's investigation of this complaint, the District offered to resolve Issue #2 of this complaint through a voluntary resolution agreement. Pursuant to OCR's procedures, a complaint may be resolved when, before the conclusion of an investigation, the recipient requests to resolve the complaint. Based on the foregoing, OCR accepted the District's request to resolve Issue #2 this complaint and the District entered into the enclosed Resolution Agreement, which when fully implemented, will resolve the allegations under Issue #2 in this complaint.

OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. Further, the Complainant may file a private lawsuit in federal court regardless of whether OCR finds a violation.

This concludes OCR's investigation of the complaint, which we are closing effective the date of this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made

¹ There is a notation by the Complainant in recent information she submitted to OCR showing that she may not agree with the type of interpreter being provided and/or the type of sign language being used. However, this was not raised at the opening of this OCR complaint and therefore, she was advised that any new allegations must be filed in a new complaint.

available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

If you have any questions regarding this complaint, please contact Angela Collins, Senior Attorney, at (404) 974-9346 or Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

/S/

Cynthia G. Pierre, Ph.D.
Regional Director

Enclosure